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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 145

CARLOS MARCELLO,

Petitioner

vs.

JOHN M. BONDS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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which is not appropriate for an agency which is scheduled to accord an alien a fair hearing. It announced that (Appendix C., Resp. Brief):

1. The "deportation move" against Marcello "was another step in the Attorney General's program of * * * deportation of undesirable persons of foreign birth *who are engaged in racketeering or other criminal activities.*"

2. Marcello "allegedly is engaged in large scale slot machine operations and other gambling activities in Louisiana."

3. Marcello's "conviction under the Marijuana Act was one of only two in *his checkered career.*" (Reference was specifically made to a 1930 assault charge for which he was pardoned.)

4. Marcello's arrest "follows lengthy investigations by both the Federal Bureau of Investigation and the Immigration and Naturalization Service."

No evidence was introduced in the immigration hearing to show that Marcello is or was a racketeer or that he is presently engaged in gambling activities in Louisiana nor that he had a "checkered career."

A more inflammatory press release can hardly be imagined. It produced the headlines mentioned in our main brief at pages 7 to 9. The headlines produced by this press release on December 30 and 31, 1952, on page one of the New Orleans Item and the New Orleans States with pictures of Marcello read as follows (Immigration File, Exhibit 7):

> "Arrest Vice King Marcello for U. S. Exile" (New Orleans States; Resp. No. 1.)
>
> "Arrest Marcello for Deportation—Mobster freed on $5,000 bond" (The article describes Marcello as the number one mobster in Louisiana. New Orleans Item; Resp. No. 2)

On December 31, 1952 the New Orleans Item (Resp. No. 5, in Exhibit 7 of the Immigration File) stated:

> "But federal law enforcement agencies—and many have figured in the background of this case—are sure that the closing scene will see Marcello aboard a ship or plane for the Italy he has never seen".

On January 6, 1953, the New Orleans Item (Resp. No. 6) stated:

> "Immigration officials predict that Marcello will lose".

Here the prosecutor himself, the hearing officer's superior, fed the press with allegations which no self restrained press ought to publish in anticipation of a hearing. See *Stroble* v. *California*, 343 U. S. 181, 201 (1952). Here, Marcello was "prejudged guilty, and the trial was but a legal gesture to register a verdict already dictated by the press and public opinion which it generated." *Shepherd* v. *Florida*, 341 U. S. 50, 51 (1950).

Canon 20 of the American Bar Association's Canons of Professional Ethics generally condemns newspaper publications by a lawyer as to pending or anticipated litigation as will interfere with a fair trial or otherwise prejudice the administration of justice. See also: Address of Hon. Herbert Brownell, Jr., on September 24, 1954, entitled "Fair Trial with a Free Press," before the Federal Bar Association.

Marcello was entitled to a fair deportation hearing. The fairness of his hearing was interfered with by the release of an inflammatory statement to the press in advance of the hearing by the hearing officer's superior—a statement which was necessarily more influential upon the hearing officer than it would be upon a juror. Moreover, as we will show,

the press release admittedly influenced the Board of Immigration Appeals.

2. *Prejudgment.* Respondent asserts that there is no allegation that the Board of Immigration Appeals was influenced by the Attorney General or by his press release (Brief, p. 12). However, it is acknowledged that the Board's refusal to grant suspension of deportation (as its opinion reveals) was influenced by newspaper clippings. The Board's opinion states as one of the bases for denying suspension (R. 66):

> "As against any evidence he (Marcello) may present, there are * * * clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the respondent's own counsel submitted and which refer to the respondent as a racketeer, 'number one mobster in Louisiana,' etc;"

The immigration transcript which is lodged with the Court distinctly shows at page 10 of the minutes of hearing that the newspaper clippings were offered solely to show prejudgment. At page 24 of the immigration minutes the following occurred:

> "SPECIAL INQUIRY OFFICER TO COUNSEL:
>
> "The newspaper clippings, Mr. Orchard, are, of course, hearsay. Actually as to their admissibility, they are inadmissible on that ground. I have no other reasons to object to their admission.
>
> By Counsel:
>
> " * * * they are offered for the purpose of showing that it was available information to you and that in the natural course of events that you probably read Mr. McGranary's press statement, and I think for that reason they are admissible."

By Special Inquiry Officer:

"They will be accepted on that ground in connection with your objection of this proceeding, and they will be marked collectively as Exhibit No. 7. * * *"

Thus, the newspaper clippings were offered for the limited purpose of showing prejudgment and not as proof of their contents. The Board of Immigration Appeals, however, utilized them as proof that Marcello was a racketeer. The Attorney General's press statement produced news stories which became affirmative evidence in the minds of the Board, influencing and controlling their judgment. Here, the record—the Board's opinion clearly and beyond a doubt shows the prejudgment condemned by this Court in *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

3. *The Administrative Procedure Act.*

(a) *Section 242(b).* Respondent acknowledges that provision for the conduct of hearings before a special inquiry officer alone does not exempt the Immigration Service from Section 5(c) of the Administrative Procedure Act (Brief p. 20). It is said, however, that Section 242(b) of the Immigration Act reveals a Congressional purpose to afford the exemption because the detailed procedure therein would be superfluous if the Administrative Procedure Act applied (Brief, pp. 15, 21, 24, 30).

We submit that Section 242(b) in its enumeration of what regulations should prescribe was originally intended to spell out what due process required—provisions obviously superfluous.

When S. 3455 was introduced in the 81st Congress, the Immigration Service was dissatisfied with the vagueness of Section 242(b). In a report on this section (on file in the Supreme Court Library), the Immigration Service stated:

"While the Service has no objection to the purposes of subsection (b), the wording of the subsection appears to be objectionable in many respects. For instance, it is provided that the proceedings 'shall be appropriate to the case and just to the party affected.' It also provides for a written notice to the alien 'in sufficient time' and that he shall be informed of the charges against him 'in sufficient detail' so that he will be able to prepare his defense. It is obvious that such vague terminology will permit contentions that provisions are not 'appropriate to the case' or 'just to the party affected,' and that notice has not been given 'in sufficient time' and that the charges have not been described 'in sufficient detail.' The possibilities of dilatory and repetitious litigation occasioned by the use of such indefinite terminology are readily apparent. The Service believes that that part of subsection (b) *preceding the last sentence* thereof would accomplish the same objectives as the subsection seeks to obtain and that at the same time be far more satisfactory to the Service if it were amended to read as follows:

"'(b) A final order or deportation in any case shall be made by the Commissioner only upon a record made in a proceeding before a special inquiry officer, at which the alien shall be present. Such proceeding shall be in accordance with such regulations as the Commissioner shall prescribe. Such regulations shall include as *minimum requirements* that:

"'(1) The alien shall have notice of the nature of the charge against him and of the time and place at which the proceeding will be held;

"'(2) The alien shall have the privilege of being

represented by counsel of his choice at no expense to the government:

"'(3) The alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government; and

"'(4) No decision shall be valid unless it is based upon probative evidence.

* * * * *

"'Notwithstanding any other law, including the Act of June 11, 1946 (60 Stat. 237), the proceedings so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien who is in the United States. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or any other law or treaty, the decision of the Commissioner shall be final.'"

Thus, it will be observed that the Immigration Service recommended the foregoing as minimum requirements to overcome the vagueness of section 242(b) of S. 3455. Thereafter S. 716 was introduced in the 82nd Congress. In its comments on S. 716, dated February 12, 1951, and filed with the Supreme Court Library, the Immigration Service recognized that section 242(b) contained provisions required by due process. It stated that it was the language *in section 242(b)* "Notwithstanding any other law including the Act of June 11, 1946," which expressly superseded the Administrative Procedure Act. These comments state:

"*Subsection (b).* This subsection relates to the conduct of deportation proceedings and the making of the decision in such cases. *It spells out in express lan-*

provisions except to the extent that such legislation shall do so expressly.

"The court is, therefore, of the opinion that the 1952 Act has not repealed or modified either the Declaratory Judgment Act or the Administrative Procedure Act, and that, therefore, this action lies."

See also: *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (C.A. 3, 1950).

We submit that the principle of the *Ngow* case is applicable here. Congress at first provided for an express repeal of the Administrative Procedure Act in section 242(b). It then removed it. In view of the admonition of section 12, this can only be interpreted as an intention to conform to the Administrative Procedure Act. Had Congress intended a repeal, it would not have utilized the equivocal and indirect method advocated by respondent. The removal of the express repeal points in only one direction—the apparent purpose of Congress to abide by the Administrative Procedure Act.

Respectfully submitted,

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